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c 6 Construction Lien Act, 1983

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CHAPTER 6

An Act to revise the Mechanics' Lien Act

Assented to January 27th, 1983

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

1.—(1) In this Act,

Interpre-
tation

1. “action” means an action under Part VIII;
2. “construction trade newspaper” means a newspaper having circulation generally throughout Ontario, that is published no less frequently than on all days except Saturdays and holidays, and in which calls for tender on construction contracts are customarily published, and that is primarily devoted to the publication of matters of concern to the construction industry;
3. “contract” means the contract between the owner and the contractor, and includes any amendment to that contract;
4. “contractor” means a person contracting with or employed directly by the owner or his agent to supply services or materials to an improvement;
5. “court” means the Supreme Court of Ontario;
6. “Crown” includes a Crown agency to which the *Crown Agency Act* applies;
7. “holdback” means the 10 per cent of the value of the services or materials supplied under a contract or subcontract required to be withheld from payment by Part IV;
8. “improvement” means,
 - i. any alteration, addition or repair to, or

R.S.O. 1980,
c. 106

- ii. any construction, erection or installation on,

any land, and includes the demolition or removal of any building, structure or works or part thereof, and “improved” has a corresponding meaning;
- 9. “interest in the premises” means an estate or interest of any nature, and includes a statutory right given or reserved to the Crown to enter any lands or premises belonging to any person or public authority for the purpose of doing any work, construction, repair or maintenance in, upon, through, over or under any lands or premises;
- 10. “land” includes any building, structure or works affixed to the land, or an appurtenance to any of them, but does not include the improvement;
- 11. “lien claimant” means a person having a preserved or perfected lien;
- 12. “materials” means every kind of movable property,
 - i. that becomes, or is intended to become, part of the improvement, or that is used directly in the making of the improvement, or that is used to facilitate directly the making of the improvement,
 - ii. that is equipment rented without an operator for use in the making of the improvement;
- 13. “mortgage” includes a charge and “mortgagee” includes a chargee;
- 14. “municipality” means a municipality as defined in the *Municipal Affairs Act* or a metropolitan, regional or district municipality, or a local board thereof;
- 15. “owner” means any person, including the Crown, having an interest in a premises at whose request and,
 - i. upon whose credit, or
 - ii. on whose behalf, or
 - iii. with whose privity or consent, or
 - iv. for whose direct benefit,

an improvement is made to the premises;

16. "payer" means the owner, contractor or subcontractor who is liable to pay for the materials or services supplied to an improvement under a contract or subcontract;
17. "payment certifier" means an architect, engineer or any other person upon whose certificate payments are made under a contract or subcontract;
18. "person having a lien" includes both a lien claimant and a person with an unpreserved lien;
19. "premises" includes,
 - i. the improvement,
 - ii. all materials supplied to the improvement, and
 - iii. the land occupied by the improvement, or enjoyed therewith, or the land upon or in respect of which the improvement was done or made;
20. "price" means the contract or subcontract price,
 - i. agreed upon between the parties, or
 - ii. where no specific price has been agreed upon between them, the actual value of the services or materials that have been supplied to the improvement under the contract or subcontract;
21. "services or materials" includes both services and materials;
22. "subcontract" means any agreement between the contractor and a subcontractor, or between two or more subcontractors, relating to the supply of services or materials to the improvement and includes any amendment to that agreement;
23. "subcontractor" means a person not contracting with or employed directly by the owner or his agent but who supplies services or materials to the improvement under an agreement with the contractor or under him with another subcontractor;
24. "suffers damages as a result" means suffers damages that could be reasonably foreseen to result;

25. “supply of services” means any work done or service performed upon or in respect of an improvement, and includes,
- i. the rental of equipment with an operator, and
 - ii. where the making of the planned improvement is not commenced, the supply of a design, plan, drawing or specification that in itself enhances the value of the owner’s interest in the land,
- and a corresponding expression has a corresponding meaning;
26. “wages” means the money earned by a worker for work done by time or as piece work, and includes all monetary supplementary benefits, whether provided for by statute, contract or collective bargaining agreement;
27. “worker” means a person employed for wages in any kind of labour;
28. “workers’ trust fund” means any trust fund maintained in whole or in part on behalf of any worker on an improvement and into which any monetary supplementary benefit is payable as wages for work done by the worker in respect of the improvement;
29. “written notice of a lien” includes a claim for lien and any written notice given by a lien claimant that,
- i. identifies his payer and identifies the premises, and
 - ii. states the amount that he has not been paid and is owed to him by his payer.

When
materials
supplied

(2) For the purposes of this Act, materials are supplied to an improvement when they are,

- (a) placed on the land on which the improvement is being made;
- (b) placed upon land designated by the owner or his agent that is in the immediate vicinity of the premises, but placing materials on the land so designated does not, of itself, make that land subject to a lien; or

- (c) in any event, incorporated into or used in making or facilitating directly the making of the improvement.

(3) A contractor or subcontractor to whom materials are supplied and who designates land under clause (2) (b) is deemed to be the owner's agent for that purpose, unless the person supplying the materials has actual notice to the contrary. Idem

2.—(1) For the purposes of this Act, a contract is substantially performed, When contract substantially performed

- (a) when the improvement to be made under that contract or a substantial part thereof is ready for use or is being used for the purposes intended; and
- (b) when the improvement to be made under that contract is capable of completion or, where there is a known defect, correction, at a cost of not more than,
 - (i) 3 per cent of the first \$500,000 of the contract price,
 - (ii) 2 per cent of the next \$500,000 of the contract price, and
 - (iii) 1 per cent of the balance of the contract price.

(2) For the purposes of this Act, where the improvement or a substantial part thereof is ready for use or is being used for the purposes intended and the remainder of the improvement cannot be completed expeditiously for reasons beyond the control of the contractor or, where the owner and the contractor agree not to complete the improvement expeditiously, the price of the services or materials remaining to be supplied and required to complete the improvement shall be deducted from the contract price in determining substantial performance. Idem

(3) For the purposes of this Act, a contract shall be deemed to be completed and services or materials shall be deemed to be last supplied to the improvement when the price of completion, correction of a known defect or last supply is not more than the lesser of, When contract deemed completed

- (a) 1 per cent of the contract price; and
- (b) \$1,000.

PART I

GENERAL

Act binds
Crown

R.S.O. 1980,
c. 290

3.—(1) Subject to section 16 (where lien does not attach to the premises), this Act binds the Crown but does not apply in respect of a contract as defined in the *Ministry of Transportation and Communications Creditors Payment Act*, and to which that Act applies.

Non-appli-
cation of
R.S.O. 1980,
c. 393, s. 7

(2) Section 7 of the *Proceedings Against the Crown Act* does not apply in respect of an action against the Crown under this Act.

Architect
does not have
lien
R.S.O. 1980,
c. 26

(3) Despite subsection 14 (1), an architect or the holder of a certificate of practice under the *Architects Act* does not have a lien.

No waiver of
rights

4. An agreement by any person who supplies services or materials to an improvement that this Act does not apply to him or that the remedies provided by it are not available for his benefit is void.

Contracts to
conform

5. Every contract or subcontract related to an improvement is deemed to be amended in so far as is necessary to be in conformity with this Act.

Minor irregu-
larities

6. No certificate, declaration or claim for lien is invalidated by reason only of a failure to comply strictly with subsection 32 (2) or (5), subsection 33 (1) or subsection 34 (5), unless in the opinion of the court a person has been prejudiced thereby, and then only to the extent of the prejudice suffered.

PART II

TRUST PROVISIONS

Owner's
trust,
amounts
received for
financing a
trust

7.—(1) All amounts received by an owner, other than the Crown or a municipality, that are to be used in the financing of the improvement, including any amount that is to be used in the payment of the purchase price of the land and the payment of prior encumbrances, constitute, subject to the payment of the purchase price of the land and prior encumbrances, a trust fund for the benefit of the contractor.

Amounts
certified as
payable

(2) Where amounts become payable under a contract to a contractor by the owner on a certificate of a payment certifier, an amount that is equal to an amount so certified that is in the

owner's hands or received by him at any time thereafter constitutes a trust fund for the benefit of the contractor.

(3) Where the substantial performance of a contract has been certified, or has been declared by the court, an amount that is equal to the unpaid price of the substantially performed portion of the contract that is in the owner's hands or is received by him at any time thereafter constitutes a trust fund for the benefit of the contractor.

Where
substantial
performance
certified

(4) The owner is the trustee of the trust fund created by subsection (1), (2) or (3), and he shall not appropriate or convert any part of a fund to his own use or to any use inconsistent with the trust until the contractor is paid all amounts related to the improvement owed to him by the owner.

Obligations
as trustee

8.—(1) All amounts,

(a) owing to a contractor or subcontractor, whether or not due or payable; or

(b) received by a contractor or subcontractor,

Contractor's
and sub-
contractor's
trust,
amounts
received a
trust

on account of the contract or subcontract price of an improvement constitute a trust fund for the benefit of the subcontractors and other persons who have supplied services or materials to the improvement who are owed amounts by the contractor or subcontractor.

(2) The contractor or subcontractor is the trustee of the trust fund created by subsection (1) and he shall not appropriate or convert any part of the fund to his own use or to any use inconsistent with the trust until all subcontractors and other persons who supply services or materials to the improvement are paid all amounts related to the improvement owed to them by him.

Obligations
as trustee

9.—(1) Where the owner's interest in a premises is sold by the owner, an amount equal to,

(a) the value of the consideration received by the owner as a result of the sale,

Vendor's
trust,
amounts
received a
trust

less,

(b) the reasonable expenses arising from the sale and the amount, if any, paid by the vendor to discharge any existing mortgage indebtedness on the premises,

constitutes a trust fund for the benefit of the contractor.

Obligations
as trustee

(2) The former owner is the trustee of the trust created by subsection (1), and he shall not appropriate or convert any part of the trust property to his own use or to any use inconsistent with the trust until the contractor is paid all amounts owed to him related to the improvement.

Payment
discharging
trust

10. Subject to Part IV (holdbacks), every payment by a trustee to a person he is liable to pay for services or materials supplied to the improvement discharges the trust of the trustee making the payment and his obligations and liability as trustee to all beneficiaries of the trust to the extent of the payment made by him.

Where trust
funds may be
reduced

11.—(1) Subject to Part IV, a trustee who pays in whole or in part for the supply of services or materials to an improvement out of money that is not subject to a trust under this Part may retain from trust funds an amount equal to that paid by him without being in breach of the trust.

Application
of trust funds
to discharge
loan

(2) Subject to Part IV, where a trustee pays in whole or in part for the supply of services or materials to an improvement out of money that is loaned to him, trust funds may be applied to discharge the loan to the extent that the lender's money was so used by the trustee, and the application of trust money does not constitute a breach of the trust.

Set-off by
trustee

12. Subject to Part IV, a trustee may, without being in breach of trust, retain from trust funds an amount that, as between himself and the person he is liable to pay under a contract or subcontract related to the improvement, is equal to the balance in the trustee's favour of all outstanding debts, claims or damages, whether or not related to the improvement.

Liability for
breach of
trust by
corporation

13.—(1) In addition to the persons who are otherwise liable in an action for breach of trust under this Part,

(a) every director or officer of a corporation; and

(b) any person, including an employee or agent of the corporation, who has effective control of a corporation or its relevant activities,

who assents to, or acquiesces in, conduct that he knows or reasonably ought to know amounts to breach of trust by the corporation is liable for the breach of trust.

(2) The question of whether a person has effective control of a corporation or its relevant activities is one of fact and in determining this the court may disregard the form of any transaction and the separate corporate existence of any participant. Effective control of corporation

(3) Where more than one person is found liable or has admitted liability for a particular breach of trust under this Part, those persons are jointly and severally liable. Joint and several liability ✓

(4) A person who is found liable, or who has admitted liability, for a particular breach of a trust under this Part is entitled to recover contribution from any other person also liable for the breach in such amount as will result in equal contribution by all parties liable for the breach unless the court considers such apportionment would not be fair and, in that case, the court may direct such contribution or indemnity as the court considers appropriate in the circumstances. Contribution

PART III

THE LIEN

14.—(1) A person who supplies services or materials to an improvement for an owner, contractor or subcontractor, has a lien upon the interest of the owner in the premises improved for the price of those services or materials. Creation of lien

(2) No person is entitled to a lien for any interest on the amount owed to him in respect of the services or materials that have been supplied by him, but nothing in this subsection affects any right that he may otherwise have to recover that interest. No lien for interest

15. A person's lien arises and takes effect when he first supplies his services or materials to the improvement. When lien arises

16.—(1) A lien does not attach to the interest of the Crown in a premises. Interest of Crown

(2) Where an improvement is made to a premises in which the Crown has an interest, but the Crown is not an owner within the meaning of this Act, the lien may attach to the interest of any other person in that premises. Interest of person other than Crown

(3) Where the Crown is the owner of a premises within the meaning of this Act, or where the premises is, Where lien does not attach to premises

- (a) a public street or highway owned by a municipality; or

(b) a railway right-of-way,

the lien does not attach to the premises but constitutes a charge as provided in section 21, and the provisions of this Act shall have effect without requiring the registration of a claim for lien against the premises.

Limitation on
value of lien

17.—(1) The lien of a person is limited to the amount owing to him in relation to the improvement and, subject to Part IV (holdbacks), it is further limited to the least amount owed in relation to the improvement by a payer to the contractor or to any subcontractor whose contract or subcontract was in whole or in part performed by the supply of services or materials giving rise to the lien.

Idem

(2) Subject to Part IV, the total value of the liens of all members of a class, as defined in section 81, is limited to the least amount owed in relation to the improvement by a payer to the contractor or to any subcontractor whose contract or subcontract was in whole or in part performed by the supply of services or materials made by the members of the class.

Set-off

(3) Subject to Part IV, in determining the amount of a lien under subsection (1) or (2), there may be taken into account the amount that is, as between a payer and the person he is liable to pay, equal to the balance in the payer's favour of all outstanding debts, claims or damages, whether or not related to the improvement.

Public
highway,
liability of
municipality
re

(4) Despite subsection (1), where land is dedicated to a municipality as a public street or highway and an improvement is made to the land at the written request of, or under an agreement with, the municipality, but not at its expense, the municipality shall nevertheless, on default of payment by the proper payer, be liable to the value of the holdbacks under Part IV that would have been required were the improvement made at the expense of the municipality, and the procedure for making a claim under this subsection shall be the same as for enforcing a claim for lien against a municipality in respect of a public street or highway.

Joint or
common
interests

18. Where the interest of the owner in the premises is held jointly or in common with another person who knew or ought reasonably to have known of the making of the improvement, the joint or common interest in the premises of that person is also subject to the lien unless the contractor receives actual notice, before the supply of services or materials to the improvement is commenced, that the person having the joint or common interest assumes no responsibility for the improvement to be made.

19.—(1) Where the interest of the owner to which the lien attaches is leasehold, the interest of the landlord shall also be subject to the lien to the same extent as the interest of the owner if the contractor gives the landlord written notice of the improvement to be made, unless the landlord, within fifteen days of receiving the notice from the contractor, gives the contractor written notice that the landlord assumes no responsibility for the improvement to be made.

Where
owner's
interest
leasehold

(2) No forfeiture of a lease to, or termination of a lease by, a landlord, except for non-payment of rent, deprives any person having a lien against the leasehold of the benefit of his lien.

Forfeiture or
termination
of lease,
effect of

(3) Where a landlord intends to enforce forfeiture or terminate a lease of the premises because of non-payment of rent, and there is a claim for lien registered against the premises in the proper land registry office, the landlord shall give notice in writing of his intention to enforce forfeiture or terminate the lease and of the amount of the unpaid rent to each person who has registered a claim for lien against the premises.

Notice to lien
claimants

(4) A person receiving notice under subsection (3) may, within ten days thereafter, pay to the landlord the amount of the unpaid rent, and the amount so paid may be added by that person to his claim for lien.

Payment of
unpaid rent

20. Where an owner enters into a single contract for improvements on more than one premises owned by him, any person supplying services or materials under that contract, or under a subcontract under that contract, may choose to have his lien follow the form of the contract and be a general lien against each of those premises for the price of all services and materials he supplied to all the premises.

General lien

21. The lien of a person is a charge upon the holdbacks required to be retained by Part IV, and subject to subsection 17 (3), any additional amount owed in relation to the improvement by a payer to the contractor or to any subcontractor whose contract or subcontract was in whole or in part performed by the supply of services or materials giving rise to the lien.

Lien a charge

PART IV

HOLDBACKS

22.—(1) Each payer upon a contract or subcontract under which a lien may arise shall retain a holdback equal to 10 per cent of the price of the services or materials as they are actually supplied under the contract or subcontract until all liens

Basic
holdback

that may be claimed against the holdback have expired as provided in Part V, or have been satisfied, discharged or provided for under section 44 (payment into court).

Separate
holdback for
finishing
work

(2) Where the contract has been certified or declared to be substantially performed but services or materials remain to be supplied to complete the contract, the payer upon the contract, or a subcontract, under which a lien may arise shall retain, from the date certified or declared to be the date of substantial performance of the contract, a separate holdback equal to 10 per cent of the price of the remaining services or materials as they are actually supplied under the contract or subcontract, until all liens that may be claimed against the holdback have expired as provided in Part V, or have been satisfied, discharged or provided for under section 44.

When
obligation to
retain applies

(3) The obligation to retain the holdbacks under subsections (1) and (2) applies irrespective of whether the contract or subcontract provides for partial payments or payment on completion.

Personal
liability of
owner

23.—(1) An owner is personally liable to those lien claimants who have valid liens against his interest in the premises to the extent of the holdbacks that he is required to retain under this Part.

How
determined

(2) The personal liability of an owner under subsection (1) may only be determined in an action under this Act.

Payments
that may be
made

24.—(1) A payer may, without jeopardy, make payments on a contract or subcontract up to 90 per cent of the price of the services or materials that have been supplied under that contract or subcontract unless, prior to making payment, the payer has received written notice of a lien.

Idem

(2) Where a payer has received written notice of a lien and has retained, in addition to the holdbacks required by this Part, an amount sufficient to satisfy the lien, the payer may, without jeopardy, make payment on a contract or subcontract up to 90 per cent of the price of the services and materials that have been supplied under that contract or subcontract, less the amount retained.

Payment
where
subcontract
certified
complete

25. Where a subcontract has been certified complete under section 33, each payer upon the contract and any subcontract may, without jeopardy, make payment reducing the holdbacks required by this Part to the extent of the amount of holdback he has retained in respect of the completed subcontract, where all liens in respect of the completed subcontract have expired as provided in Part V, or have been satisfied,

discharged or provided for under section 44 (payment into court).

26. Each payer upon the contract or a subcontract may, without jeopardy, make payment of the holdback he is required to retain by subsection 22 (1) (basic holdback), so as to discharge all claims in respect of that holdback, where all liens that may be claimed against that holdback have expired as provided in Part V, or have been satisfied, discharged or provided for under section 44.

Payment of
basic
holdback

27. Each payer upon the contract or a subcontract may, without jeopardy, make payment of the holdback he is required to retain by subsection 22 (2) (holdback for finishing work), so as to discharge all claims in respect of that holdback, where all liens that may be claimed against that holdback have expired as provided in Part V, or have been satisfied, discharged or provided for under section 44.

Payment of
holdback for
finishing
work

28. Where an owner, contractor or subcontractor makes a payment without obligation to do so to any person having a lien for or on account of any amount owing to that person for services or materials supplied to the improvement and gives written notice of the payment or his intention to pay to the proper payer of that person, the payment shall be deemed to be a payment by the owner, contractor or subcontractor to the proper payer of that person, but no such payment reduces the amount of the holdback required to be retained under this Part or reduces the amount that must be retained in response to a written notice of lien given by a person other than the person to whom payment is made.

Direct
payment to
person
having lien

29. Payments made in accordance with this Part operate as a discharge of the lien to the extent of the amount paid.

Discharge,
extent of

30. Where the contractor or a subcontractor defaults in the performance of his contract or subcontract, a holdback shall not be applied by any payer toward obtaining services or materials in substitution for those that were to have been supplied by the person in default, nor in payment or satisfaction of any claim against the person in default, until all liens that may be claimed against that holdback have expired as provided in Part V, or have been satisfied, discharged or provided for under section 44 (payment into court).

How
holdback not
to be applied

PART V

EXPIRY, PRESERVATION AND PERFECTION OF LIENS

Expiry of
liens

31.—(1) Unless preserved under section 34, the liens arising from the supply of services or materials to an improvement expire as provided in this section.

Contractor's
liens

(2) Subject to subsection (4), the lien of a contractor,

(a) for services or materials supplied to an improvement on or before the date certified or declared to be the date of the substantial performance of the contract, expires at the conclusion of the forty-five day period next following the occurrence of the earlier of,

(i) the date on which a copy of the certificate or declaration of the substantial performance of the contract is published as provided in section 32, and

(ii) the date the contract is completed or abandoned; and

(b) for services or materials supplied to the improvement where there is no certification or declaration of the substantial performance of the contract, or for services or materials supplied to the improvement after the date certified or declared to be the date of substantial performance, expires at the conclusion of the forty-five day period next following the occurrence of the earlier of,

(i) the date the contract is completed, and

(ii) the date the contract is abandoned.

Liens of
other persons

(3) Subject to subsection (4), the lien of any other person,

(a) for services or materials supplied to an improvement on or before the date certified or declared to be the date of the substantial performance of the contract, expires at the conclusion of the forty-five day period next following the occurrence of the earliest of,

(i) the date on which a copy of the certificate or declaration of the substantial performance of the contract is published, as provided in section 32, and

- (ii) the date on which he last supplies services or materials to the improvement, and
 - (iii) the date a subcontract is certified to be completed under section 33, where the services or materials were supplied under or in respect of that subcontract; and
 - (b) for services or materials supplied to the improvement where there is no certification or declaration of the substantial performance of the contract, or for services or materials supplied to the improvement after the date certified or declared to be the date of the substantial performance of the contract, expires at the conclusion of the forty-five day period next following the occurrence of the earlier of,
 - (i) the date on which he last supplied services or materials to the improvement, and
 - (ii) the date a subcontract is certified to be completed under section 33, where the services or materials were supplied under or in respect of that subcontract.
- (4) Where a person has supplied services or materials to an improvement on or before the date certified or declared to be the date of the substantial performance of the contract and has also supplied, or is to supply, services or materials after that date, his lien in respect of the services or materials supplied on or before the date of substantial performance expires without affecting any lien that he may have for the supply of services or materials after that date.
- Separate
liens when
ongoing
supply
- (5) Where a person who has supplied services or materials under a contract or subcontract makes a declaration in the prescribed form declaring,
- Declaration
of last supply
- (a) the date on which he last supplied services or materials under that contract or subcontract; and
 - (b) that he will not supply any further services or materials under that contract or subcontract,

then the facts so stated shall be deemed to be true against the person making the declaration.

Rules
governing
certification
or
declaration
of substantial
performance

32.—(1) The following rules govern the certification and declaration of the substantial performance of a contract:

1. On the application of the contractor, the payment certifier, or if there is no payment certifier, the owner and the contractor jointly shall determine whether a contract has been substantially performed in accordance with section 2, and where he or they so determine, shall certify the substantial performance of the contract by signing a certificate in the prescribed form.
2. The payment certifier or the owner and the contractor jointly, as the case may be, shall set out in the certificate the date on which the contract was substantially performed.
3. The date set out in the certificate as the date on which the contract was substantially performed is deemed for the purpose of this Act to be the date on which that event occurred.
4. Where the payment certifier certifies the substantial performance of a contract he shall within seven days of the day the certificate is signed give a copy of the certificate to the owner and to the contractor.
5. The contractor shall publish a copy of the certificate once in a construction trade newspaper.
6. Where the contractor does not publish a copy of the certificate within seven days of receiving a copy of the certificate signed by the payment certifier or, where there is no payment certifier, signed by the owner, any person may publish a copy of the certificate.
7. Where there is a failure or refusal to certify substantial performance of the contract within a reasonable time, any person may apply to the court, and the court, upon being satisfied that the contract is substantially performed, and upon such terms as to costs or otherwise as it considers fit, may declare that the contract has been substantially performed, and the declaration has the same force and effect as a certificate of substantial performance of the contract.
8. Unless the court otherwise orders, the day the declaration is made shall be deemed to be the date the contract was substantially performed.

9. The person who applied to the court shall publish a copy of the declaration of substantial performance once in a construction trade newspaper.
10. For the purposes of this Part, a certificate or declaration of the substantial performance of a contract has no effect until a copy of the certificate or declaration is published.

(2) Every certificate or declaration made or given under this section shall include, Contents of certificate

- (a) the name and address for service of the owner and of the contractor;
- (b) the name and address of the payment certifier, where there is one;
- (c) a short description of the improvement;
- (d) the date on which the contract was substantially performed;
- (e) where the lien attaches to the premises, a concise description containing a reference to lot and plan or instrument registration number sufficient to identify the premises; and
- (f) the street address, if any, of the premises.

(3) Any person who is required by this section to make a determination of the substantial performance of a contract, and who after receiving an application fails or refuses within a reasonable time to certify the substantial performance of the contract, even though there is no reasonable doubt that the contract has, in fact, been substantially performed, is liable to anyone who suffers damages as a result. Liability for refusal to certify

(4) A payment certifier who fails to comply with paragraph 4 of subsection (1) is liable to anyone who suffers damages as a result. Liability for failure to furnish copy of certificate

(5) A construction trade newspaper shall publish upon commercially reasonable terms copies of certificates or declarations of substantial performance in the prescribed form and manner. Manner of publication

33.—(1) Upon the request of the contractor, the payment certifier on the contract, or the owner and the contractor jointly, may determine whether a subcontract has been completed, and where he or they so determine, he or they may Certificate re subcontract

certify the completion of the subcontract in the prescribed form.

Date subcontract deemed completed

(2) Where a subcontract is certified to be completed, the subcontract shall be deemed to have been completed on the date of certification.

Services or materials supplied after subcontract certified completed

(3) If services or materials are supplied to the improvement under or in respect of a subcontract after the date the subcontract is certified to be completed, those services or materials shall be deemed to have been last supplied on the date of certification.

Copy of certificate

(4) Within seven days of the date the subcontract is certified to be completed, the payment certifier or the owner and the contractor, as the case may be, shall give a copy of the certificate,

- (a) to the subcontractor whose subcontract has been certified as complete; and
- (b) to the owner and the contractor, where certification is by the payment certifier.

How lien preserved

34.—(1) A lien may be preserved during the supplying of services or materials or at any time before it expires,

- (a) where the lien attaches to the premises, by the registration in the proper land registry office of a claim for lien on the title of the premises in accordance with this Part; and
- (b) where the lien does not attach to the premises, by giving to the owner a copy of the claim for lien together with the affidavit of verification required by subsection (6).

Public highway

(2) Where a claim for lien is in respect of a public street or highway owned by a municipality, the copy of the claim for lien and affidavit shall be given to the clerk of the municipality.

Premises owned by Crown

(3) Where the owner of the premises is the Crown, the copy of the claim for lien and affidavit shall be given to the office prescribed by regulation, or where no office has been prescribed, to the ministry or Crown agency for whom the improvement is made.

Railway right-of-way

(4) Where the premises is a railway right-of-way, the copy of the claim for lien and affidavit shall be given to the manager or

any person apparently in charge of any office of the railway in Ontario.

(5) Every claim for lien shall set out:

Contents of
claim for lien

- (a) the name and address for service of the person claiming the lien and the name and address of the owner of the premises and of the person for whom the services or materials were supplied and the time within which those services or materials were supplied;
- (b) a short description of the services or materials that were supplied;
- (c) the contract price or subcontract price;
- (d) the amount claimed in respect of services or materials that have been supplied; and
- (e) a description of the premises,
 - (i) where the lien attaches to the premises, sufficient for registration under the *Land Titles Act* or the *Registry Act*, as the case may be, or
 - (ii) where the lien does not attach to the premises, being the address or other identification of the location of the premises.

R.S.O. 1980,
cc. 230, 445

(6) A claim for lien shall be verified by an affidavit of the person claiming the lien, including a trustee of the workers' trust fund where subsection 83 (2) applies, or of an agent or assignee of the claimant who has informed himself of the facts set out in the claim, and the affidavit of the agent or assignee shall state that he believes those facts to be true.

Affidavit of
verification

(7) Subject to subsection 44 (4) (apportionment), a general lien shall be preserved against each of the premises that the person having the lien desires the lien to continue to apply against, and the claim against each premises may be for the price of the services or materials that have been supplied to all the premises.

Preservation
of general
lien

(8) Any number of persons having liens upon the same premises may unite in a claim for lien, but where more than one lien is included in one claim, each person's lien shall be verified by affidavit as required by subsection (6).

Who may
join in claim

Liability for exaggerated claim, etc.

35. In addition to any other ground on which he may be liable, any person who preserves a claim for lien or who gives written notice of a lien,

- (a) for an amount which he knows or ought to know is grossly in excess of the amount which he is owed; or
- (b) where he knows or ought to know that he does not have a lien,

is liable to any person who suffers damages as a result.

What liens may be perfected

36.—(1) A lien may not be perfected unless it is preserved.

Expiry of preserved lien

(2) A lien that has been preserved expires unless it is perfected prior to the end of the forty-five day period next following the last day, under section 31, on which the lien could have been preserved.

How lien perfected

(3) A lien claimant perfects his preserved lien,

- (a) where the lien attaches to the premises, when he commences an action to enforce his lien and, except where an order to vacate the registration of his lien is made, he registers a certificate of action in the prescribed form on the title of the premises; or
- (b) where the lien does not attach to the premises, when he commences an action to enforce his lien.

Rules re sheltering

(4) A preserved lien becomes perfected by sheltering under a lien perfected by another lien claimant in respect of the same improvement in accordance with the following rules:

1. The preserved lien of a lien claimant is perfected by sheltering under the perfected lien of another lien claimant in respect of the same improvement where,
 - i. the lien of that other lien claimant was a subsisting perfected lien at the time when the lien of the lien claimant was preserved, or
 - ii. the lien of that other lien claimant is perfected in accordance with clause (3) (a) or (b) between the time when the lien of the lien claimant was preserved and the time that the lien of the lien claimant would have expired under subsection (2).

2. The validity of the perfection of a sheltered lien does not depend upon the validity, proper preservation or perfection of the lien under which it is sheltered.
3. A sheltered claim for lien is perfected only as to the defendants and the nature of the relief claimed in the statement of claim under which it is sheltered.
4. Upon notice given by a defendant named in a statement of claim, any lien claimant whose lien is sheltered under that statement of claim shall provide the defendant with further particulars of his claim or of any fact alleged in his claim for lien.

(5) Subject to subsection 44 (4) (apportionment), a preserved general lien that attaches to the premises shall be perfected against each premises to which the person having the lien desires the lien to continue to apply. General lien

37.—(1) A perfected lien expires where, Expiry of perfected lien

- (a) no day is fixed under section 62 for the trial of an action in which that lien may be realized; or
- (b) an action in which that lien may be realized is not set down for trial.

within two years of the date of the commencement of the action which perfected that lien.

(2) Where a lien has expired under subsection (1), an application may be made under section 46. Application under s. 46

38. The expiration of a lien under this Act shall not affect any other legal or equitable right or remedy otherwise available to the person whose lien has expired. Saving other rights

PART VI

RIGHT TO INFORMATION

39.—(1) Any person having a lien or who is the beneficiary of a trust under Part II or who is a mortgagee may, at any time, by written request, require information to be provided within a reasonable time, not to exceed twenty-one days, as follows: Right to information;

1. By the owner or contractor, with, from owner or contractor
 - i. the names of the parties to the contract.

- ii. the contract price,
- iii. the state of accounts between the owner and the contractor, and
- iv. a copy of any labour and material payment bond in respect of the contract posted by the contractor with the owner.

from
contractor or
subcontractor

2. By the contractor or a subcontractor, with,

- i. the names of the parties to a subcontract,
- ii. the state of accounts between the contractor and a subcontractor or between a subcontractor and another subcontractor,
- iii. a statement of whether there is a provision in a subcontract providing for certification of the subcontract,
- iv. a statement of whether a subcontract has been certified as complete, and
- v. a copy of any labour and material payment bond posted by a subcontractor with the contractor or by a subcontractor with another subcontractor.

from
mortgagee or
unpaid
vendor

(2) Any person having a lien or any beneficiary of a trust under Part II may, at any time, by written request, require a mortgagee or unpaid vendor to provide him within a reasonable time, not to exceed twenty-one days, with,

- (a) sufficient details concerning any mortgage on the premises to enable the person who requests the information to determine whether the mortgage was taken by the mortgagee for the purposes of financing the making of the improvement;
- (b) a statement showing the amount advanced under the mortgage, the dates of those advances, and any arrears in payment including any arrears in the payment of interest; or
- (c) a statement showing the amount secured under the agreement of purchase and sale and any arrears in payment including any arrears in the payment of interest.

(3) The trustee of a workers' trust fund may at any time by written request require any contractor or subcontractor to permit him, within a reasonable time after making the request, not to exceed twenty-one days, to inspect the payroll records of all workers who are beneficiaries of the fund, and who have supplied labour to the making of the improvement, and who are employed by the contractor or the subcontractor.

by trustee or
workers'
trust fund

(4) A contractor shall, upon written request whenever made to him by any person, within a reasonable time furnish in writing to the person the date of publication and the name of the construction trade newspaper in which a copy of a certificate of substantial performance has been published under subsection 32 (1).

respecting
publication
of certificate
of substantial
performance

(5) Where a person, who is required under subsection (1), (2), (3) or (4) to provide information or access to information, does not provide the information or access to information as required or knowingly or negligently mis-states that information, he is liable to the person who made the request for any damages sustained by reason thereof.

Liability for
failure to
provide
information

(6) Upon motion, the court may at any time, whether or not an action has been commenced, order a person to comply with a request that has been made to him under this section and when making the order, the court may make any order as to costs as it considers appropriate in the circumstances, including an order for the payment of costs on a solicitor-and-client basis.

Order by
court to
comply with
request

40.—(1) Any person who has verified a claim for lien that has been preserved is liable to be cross-examined without an order on the claim for lien at any time, irrespective of whether an action has been commenced.

Cross-
examination
on claim for
lien

(2) There shall be only one examination under subsection (1), but the contractor, the payer of the lien claimant, and every person named in the claim for lien who has an interest in the premises are entitled to participate therein.

Who may
participate

(3) Any person intending to examine a person under subsection (1) shall give at least seven days notice of the examination specifying the time and place for the examination to,

Notice

- (a) the person to be examined or his solicitor;
- (b) every other person named in the claim for lien as having an interest in the premises;
- (c) the contractor; and

(d) the payer of the lien claimant.

Application
of rules of
practice

(4) The Supreme Court Rules of Practice pertaining to examinations apply, with necessary modifications, to cross-examinations under this section.

PART VII

DISCHARGE OF PRESERVED OR PERFECTED LIENS

Discharge of
lien claim by
release

41.—(1) A preserved or perfected lien may be discharged,

- (a) where the lien attaches to the premises, by the registration of a release in the prescribed form on the title to the premises and the release shall, except where the lien claimant is a corporation, be supported by an affidavit of execution; or
- (b) where the lien does not attach to the premises, by giving a release in the prescribed form to the owner, in the manner set out in section 34 for the giving of copies of the claim for lien.

Withdrawal
of notice of
lien

(2) A written notice of a lien may be withdrawn by giving a withdrawal in writing to the person to whom the written notice of a lien was given, and a payer given the withdrawal shall, in respect of the operation of subsection 24 (2), be in the same position as if the written notice of a lien had never been given.

Discharge of
general lien

42. A preserved or perfected general lien may be discharged against any one or more of the premises that are subject to it, without affecting its application to any other premises to which it applies, by the registration of a release in the prescribed form on the title to the premises released.

Postpone-
ment of lien
claim

43. A preserved or perfected lien may be postponed in favour of the interest of another person in the premises by the registration on the title to the premises of a notice of postponement in the prescribed form, and in that case, subsection 80 (8) applies (priorities in event of postponement).

Vacating lien
by payment
into court;
without
notice

44.—(1) Upon the motion of any person, without notice to any other person, the court shall make an order vacating,

- (a) where the lien attaches to the premises, the registration of a claim for lien and any certificate of action in respect of that lien; or
- (b) where the lien does not attach to the premises, the claim for lien,

where the person bringing the motion pays into court, or posts security in an amount equal to, the total of.

- (c) the full amount claimed as owing in the claim for lien; and
- (d) the lesser of \$50,000 or 25 per cent of the amount described in clause (c), as security for costs.

(2) Upon the motion of any person, the court may make an order vacating the registration of a claim for lien, and any certificate of action in respect of that lien, upon the payment into court or the posting of security of an amount that the court determines to be reasonable in the circumstances to satisfy the lien.

on payment
in of
reasonable
amount

(3) Where the lien does not attach to the premises, the court may make an order, upon the motion of any person, vacating a claim for lien given to the owner, upon the payment into court or the posting of security of an amount that the court determines to be reasonable in the circumstances to satisfy the lien.

Where lien
does not
attach to
premises

(4) Where a motion is made to vacate the registration of a general lien against one or more of the premises subject to that lien, the court may apportion the general lien between the premises in respect of which the application is made and all other premises that are subject to the lien.

Where
general lien

(5) Where an amount has been paid into court or security has been posted with the court under this section, the court, upon notice to such persons as it may require, may order where it is appropriate to do so,

Reduction of
amount paid
into court

- (a) the reduction of the amount paid into court, and the payment of any part of the amount paid into court to the person entitled; or
- (b) the reduction of the amount of security posted with the court, and the delivery up of the security posted with the court for cancellation or substitution, as the case may be.

(6) Where an order is made under clause (1) (a) or subsection (2), the lien ceases to attach to the premises and ceases to attach to the holdbacks and other amounts subject to a charge under section 21, and becomes instead a charge upon the amount paid into court or security posted, and the owner or payer shall, in respect of the operation of sections 21, 23 and 24, be in the same position as if the lien had not been preserved or written notice of the lien had not been given.

Lien a charge
upon amount
paid into
court

Idem

(7) Where an order is made under clause (1) (b) or subsection (3), the lien ceases to attach to the holdbacks and other amounts subject to a charge under section 21 and becomes instead a charge upon the amount paid into court or security posted and the owner or payer shall, in respect of the operation of sections 21, 23 and 24, be in the same position as if the lien had not been preserved or written notice of the lien had not been given.

Consolidation of motions

(8) Where more than one motion is made under subsection (1), (2) or (3) for the payment into court or posting of security to obtain an order vacating the registration of one or more preserved or perfected liens arising from the same improvement, the court may consolidate the motions and require that the amount paid into court or security posted be adequate to satisfy all the liens that are the subject of each of the motions, or make any other order that it considers appropriate.

Rules

(9) Where an order is made under subsection (1), (2) or (3), the following rules apply:

1. The lien claimant whose lien was the subject of the order may proceed with an action to enforce his claim against the amount paid into court or security posted in accordance with the procedures set out in Part VIII, but no certificate of action shall be registered against the premises.
2. The amount paid into court or security posted is subject to the claims of all persons having a lien to the same extent as if the amount paid into court or security posted was realized by the sale of the premises in an action to enforce the lien and shall be distributed among all lien claimants in accordance with the priorities provided for in section 82.
3. Where any amount is realized in a lien action by the sale of the premises or otherwise, it shall be pooled into a common fund with the amount paid into court or security posted under this section, and shall be distributed among all lien claimants in accordance with the priorities provided for in section 82.

Declaration by court that preserved lien has expired

45.—(1) Where a lien that attaches to the premises is not preserved or is not perfected within the time allowed for doing so under section 31 or 36, the court upon,

- (a) the motion of any person without notice to any other person;

(b) proof that the lien has not been preserved or perfected within the time allowed; and

(c) production of,

(i) a certificate of search under the *Land Titles Act*, or R.S.O. 1980,
c. 230

(ii) a registrar's abstract under the *Registry Act*, R.S.O. 1980,
c. 445

together with a certified copy of the claim for lien,

shall declare that the lien has expired and order that the registration of the claim for lien be vacated.

(2) Where the court is satisfied that a lien that does not attach to the premises has not been preserved or perfected within the time allowed for doing so under section 31 or 36, the court upon the motion of any person without notice to any other person shall declare that the lien has expired. Idem

(3) Where a declaration is made under subsection (1) or (2), the court shall order that, Order
returning
amount paid
into court or
cancelling
security

(a) any amount that has been paid into court under section 44 in respect of that lien be returned to the person who paid the amount into court; and

(b) any security that has been posted under section 44 in respect of that lien be cancelled.

46.—(1) Where a perfected lien that attaches to the premises has expired under section 37, the court, upon the motion of any person, shall declare that the lien has expired and shall make an order dismissing the action to enforce that lien and vacating the registration of a claim for lien and the certificate of action in respect of that action. Order
dismissing
action, etc.

(2) Where a perfected lien that does not attach to the premises has expired under section 37, the court, upon the motion of any person, shall declare that the lien has expired and shall make an order dismissing the action to realize upon that lien. Idem

(3) A motion under subsection (1) or (2) may be brought without notice, but no order as to costs in the action may be made upon the motion unless notice of that motion was given to the person against whom the order for costs is sought. Costs

Order
returning
money paid
into court or
cancelling
security

(4) Where an action is dismissed under subsection (1) or (2), the court shall order that,

- (a) any amount that has been paid into court under section 44 in respect of that action be returned to the person who paid the amount into court; and
- (b) any security that has been posted under section 44 in respect of that action be cancelled.

General
power to
discharge lien

47.—(1) Upon motion, the court may,

- (a) order the discharge of a lien;
- (b) order that the registration of,
 - (i) a claim for lien, or
 - (ii) a certificate of action,
 or both, be vacated;
- (c) declare, where written notice of a lien has been given, that the lien has expired, or that the written notice of the lien shall no longer bind the person to whom it was given; or
- (d) dismiss an action,

upon any proper ground and subject to any terms and conditions that the court considers appropriate in the circumstances.

Direction by
court

(2) Where a certificate of action is vacated under subsection (1), and there remain liens which may be enforced in the action to which that certificate relates, the court shall give any directions that are necessary in the circumstances in respect of the continuation of that action.

Discharge
irrevocable

48. A discharge of a lien under this Part is irrevocable and the discharged lien cannot be revived, but no discharge affects the right of the person whose lien was discharged to claim a lien in respect of services or materials supplied by him subsequent to the preservation of the discharged lien.

Registration

49. Where the lien attaches to the premises, an order declaring that a lien has expired, or discharging a lien, or vacating the registration of a claim for lien or a certificate of action, may be registered by registering on the title to the premises a certified copy of the order that includes a description of the

premises sufficient for registration under the *Registry Act* or the *Land Titles Act*, as the case may be, and a reference to the registration number of every preserved or perfected claim for lien and certificate of action thereby affected.

R.S.O. 1980,
cc. 445, 230

PART VIII

JURISDICTION AND PROCEDURE

50.—(1) A lien claim is enforceable in an action in the Supreme Court in accordance with the procedure set out in this Part.

Lien claim
enforceable
in action

(2) A trust claim shall not be joined with a lien claim but may be brought in any court of competent jurisdiction.

Trust claim
and lien
claim not to
be joined

(3) Any number of lien claimants whose liens are in respect of the same owner and the same premises may join in the same action.

Joinder in
action

51.—(1) Where the premises or a part thereof are situate in the Judicial District of York, an action shall be tried by a judge of the court.

Where
premises
situate in
Judicial
District of
York

(2) Where the premises are situate outside the Judicial District of York, an action shall be tried,

Where
premises
situate
outside
Judicial
District of
York

(a) by a local judge of the court having jurisdiction in the county or district in which the premises or a part thereof are situate;

(b) on consent of the persons to whom a notice of trial must be given and on the order of the local judge otherwise having jurisdiction over the action, by a local judge of the court in a county or district other than the one in which the premises or a part thereof are situate, but not in the Judicial District of York; or

(c) where upon motion the local judge so orders, by a judge of the court at the regular sittings of the court for the trial of actions in the county or district in which the premises or a part thereof are situate.

(3) Where the premises or a part thereof are situate in more than one county or district, an action may be tried by any judge or local judge who has jurisdiction under subsection (1) or (2) in any of the counties or districts in which the premises are situate.

Where
premises
situate in
more than
one county

Powers of
master, etc.

52.—(1) Except as provided in subsection (2),

- (a) a master, where the premises or a part thereof are situate in the Judicial District of York;
- (b) a local master appointed for, or a master assigned to, the county or district in which the premises or a part thereof are situate, where the premises are situate outside the Judicial District of York;
- (c) a local judge, where the local judge has ordered that the action be tried by a judge of the court under clause 51 (2) (c),

has jurisdiction to hear and dispose of any motion under this Act, including a motion brought prior to the commencement of an action, and all motions relating to the conduct of an action or reference under this Act.

What matters
not to be
dealt with by
master

(2) A master or appointed local master shall not hear or dispose of,

- (a) a motion for the trial of the action by a judge under clause 51 (2) (c);
- (b) a motion for the reference of an action to a master or appointed local master for trial;
- (c) an originating application; or
- (d) a motion in respect of an appeal.

Further
powers of
master

(3) In addition to his jurisdiction under subsection (1), a master or appointed local master to whom a reference has been directed has all the jurisdiction, powers and authority of the court to try and completely dispose of the action and all matters and questions arising in connection with the action, including the giving of leave to amend any pleading and the giving of directions to a receiver or trustee appointed by the court.

Court to
dispose
completely of
action

53. The court, whether the action is being tried by a judge or local judge, or by a master or an appointed local master on a reference,

- (a) shall try the action, including any set-off, crossclaim, counterclaim, and, subject to section 58, third party claim, and all questions that arise therein or that are necessary to be tried in order to dispose completely of the action and to adjust the rights and liabilities of

the persons appearing before it or upon whom notice of trial has been served; and

- (b) shall take all accounts, make all inquiries, give all directions and do all things necessary to dispose finally of the action and all matters, questions and accounts arising therein or at the trial and to adjust the rights and liabilities of, and give all necessary relief to, all parties to the action.

54. A judge, local judge, master or an appointed local master does not acquire exclusive jurisdiction over the trial of an action or reference by reason only of his appointing the time and place for the trial of the action or reference, or for the holding of a settlement meeting.

Where
exclusive
jurisdiction
not acquired

55.—(1) An action shall be commenced by filing a statement of claim in the office of the registrar or local registrar of the court in the county or district in which the premises or a part thereof are situate.

How action
commenced

(2) The statement of claim shall be served within ninety days after it is filed, but the court may, upon a motion made before or after the expiration of that period of time, extend the time for service.

Service of
statement of
claim

(3) A crossclaim or counterclaim by any person shall accompany his statement of defence, but on motion the court may grant leave to deliver a crossclaim or counterclaim after this time where it is appropriate to do so, and where leave is granted, the court may.

Crossclaim or
counterclaim

- (a) make any order as to costs that it considers appropriate; and

- (b) give directions as to the conduct of the action.

56.—(1) The time for delivering a statement of defence to a lien claim, crossclaim, counterclaim or third party claim shall be twenty days.

Time for
delivery of
pleadings

(2) Where a person against whom a claim is made in a statement of claim, counterclaim, crossclaim or third party claim defaults in the delivery of a statement of defence in respect of that claim, pleadings may be noted closed against him in respect of that claim.

Noting
pleadings
closed

(3) Where pleadings have been noted closed against a defendant or third party under subsection (2), he shall not be permitted to contest the claim of the person who named him as a de-

Effect of
default in
defence

defendant or third party, or to file a statement of defence, except with leave of the court, to be given only where the court is satisfied that there is evidence to support a defence, and where leave is granted, the court,

- (a) may make any order as to costs that it considers appropriate; and
- (b) may give directions as to the conduct of the action.

Allegations
of fact
deemed
admitted

(4) Except where leave has been granted under subsection (3), a defendant or third party against whom pleadings have been noted closed under subsection (2) shall be deemed to admit all allegations of fact made in the statement of claim, counterclaim, crossclaim or third party claim, as the case may be, and shall not be entitled to notice of or to participate in the trial of the action or any proceeding in respect of the action and judgment may be given against him.

Warning to
be included

(5) Every statement of claim, crossclaim, counterclaim or third party claim shall include the following warning:

“WARNING: If you wish to defend against this claim, you are required to deliver a statement of defence within twenty days. Should you fail to deliver a statement of defence as required, pleadings may be noted closed against you, and you shall be deemed to admit all allegations of fact contained in this claim, and you shall not be entitled to notice of or to participate in the trial or any proceeding in respect of this claim and judgment may be given against you.”

Joinder of
claims

57.—(1) A plaintiff in an action may join with his lien claim a claim for breach of his contract or subcontract.

Counter-
claims and
crossclaims

- (2) A defendant in an action may,
- (a) counterclaim against the person who named him as a defendant in respect of any claim that he may be entitled to make against that person, whether or not that claim is related to the making of the improvement;
 - (b) crossclaim against a co-defendant in respect of any claim that he may be entitled to make against that person related to the making of the improvement.

58. The following rules govern third party proceedings:

Rules re third party proceedings

1. Subject to paragraph 2, a person against whom a claim is made in a statement of claim, crossclaim, counterclaim or third party claim may join a person who is not a party to the action as a third party for the purpose of claiming contribution or indemnity from the third party in respect of that claim.
2. A person may only be joined as a third party with leave of the court upon a motion made with notice to the owner and all persons having subsisting preserved or perfected liens at the time of the motion, but such leave shall not be given unless the court is satisfied that the trial of the third party claim will not,
 - i. unduly prejudice the ability of the third party or of any lien claimant or defendant to prosecute his claim or conduct his defence, or
 - ii. unduly delay or complicate the resolution of the lien action.
3. The court may give such directions as it considers appropriate in the circumstances in respect of the conduct of third party proceedings.

59.—(1) The person serving the notice of trial and all persons served with notice of trial are parties to the action. Parties

(2) Subject to section 56, the court may at any time add or join any person as a party to the action. Adding parties

60.—(1) On motion made after the delivery of all statements of defence, or the statements of defence to all cross-claims, counterclaims or third party claims, if any, or the time for their delivery has expired, Reference to master, etc.

(a) a judge may refer to a master; or

(b) a local judge may refer to a master assigned to, or a local master appointed for, the county or district in which the trial is to take place,

the whole action for trial under section 71 of the *Judicature Act*. R.S.O. 1980, c. 223

(2) At the trial, Idem

(a) a judge may direct a reference to a master; or

- (b) a local judge may direct a reference to a master assigned to, or a local master appointed for, the county or district in which the trial is to take place,

R.S.O. 1980,
c. 223

under section 70 or 71 of the *Judicature Act*.

Application
to set aside
order of
reference

(3) Where under subsection (1), the action has been referred to the master or local master for trial, any person who subsequently becomes a party to the action may, within seven days after becoming a party to the action, make a motion to a judge or the local judge of the court who directed the reference to set aside the judgment directing the reference.

Effect on
subsequent
party to
action

(4) Where no motion is made under subsection (3), or where the motion is refused, the person who subsequently became a party to the action is bound by the judgment directing the reference as if he had been a party to the action at the time the reference was directed.

Carriage of
action

61.—(1) The court may at any time make an order awarding carriage of the action to any person who has a perfected lien.

Consolidation of
actions

(2) Where more than one action is brought to enforce liens in respect of the same improvement, the court may,

- (a) consolidate all the actions into one action; and
- (b) award carriage of the action to any person who has a perfected lien.

Application
to fix date for
trial or
settlement
meeting

62.—(1) Any party may make a motion to the court without notice to any other person at any time after,

- (a) the delivery of the statements of defence, or the statements of defence to all crossclaims, counterclaims or third party claims, if any, where the plaintiff's claim is disputed; or
- (b) the expiry of the time for the delivery of these statements of defence in all other cases,

to have a day, time and place fixed for the trial of the action, or for the holding of a settlement meeting under section 63, or both.

Notice of
settlement
meeting

(2) Where the court orders the holding of a settlement meeting, then at least ten days before the date appointed for the holding of the meeting, the party who obtained the appoint-

ment shall serve a notice of settlement meeting upon any person who was, on the twelfth day before the date appointed,

- (a) subject to section 56 (default in filing defence), the owner and every other person named as a defendant in every statement of claim in respect of the action;
- (b) where the lien attaches to the premises, a person with a registered interest in the premises;
- (c) where the lien attaches to the premises, an execution creditor of the owner;
- (d) any other person having a preserved or perfected lien against the premises; and
- (e) a person joined as a third party under section 58.

(3) Where the lien does not attach to the premises, the party who obtained the appointment for the holding of the settlement meeting shall request the owner to inform him of the identity of every person described in clause (2) (d). Request to identify other persons having lien

(4) Subject to section 56, where the court fixes a date for trial, the party who obtained the appointment shall serve a notice of trial, at least ten days before the date appointed for trial, upon any person who is or would be entitled to a notice of a settlement meeting under subsection (2). Service of notice of trial

63.—(1) Where a settlement meeting is ordered by the court, it shall be conducted in accordance with this section. Conduct of settlement meeting

(2) The settlement meeting shall be conducted by, Idem

- (a) a person selected by a majority of the persons present at the meeting; or
- (b) where no person is selected, by the person who took out the appointment,

and shall be for the purpose of resolving or narrowing any issues to be tried in the action.

(3) The results of the settlement meeting shall be embodied in a statement of settlement which shall summarize those issues of fact and law which have been settled by the parties. Idem

(4) The statement of settlement shall be filed with the court and shall be attached to and form part of the record, and the settlement shall be binding upon all persons served with notice Statement of settlement

of the settlement meeting, and upon all defendants against whom pleadings have been noted closed under section 56, but subject to subsection 56 (3), the court may vary or set aside the statement of settlement upon such order as to costs or otherwise as it considers appropriate.

Power of
court

(5) Upon the filing of the statement of settlement with the court, the court may,

- (a) if there was no dispute at the meeting to a claim for lien, declare the lien valid and give such further judgment as it considers appropriate;
- (b) enter a judgment or make a report upon consent on those issues which have been settled by the parties;
- (c) make any order that is necessary in order to give effect to any judgment or report of the court under clause (a) or (b); and
- (d) make any order that is necessary for, or will expedite the conduct of, the trial.

Non-
application of
rule 244

(6) Rule 244 of the Supreme Court Rules of Practice does not apply to an action under this Act.

Judgment or
report

64.—(1) The results of the trial shall be embodied,

- (a) in a judgment in the prescribed form, where the trial is conducted by a judge or local judge of the court; or
- (b) in a report in the prescribed form, where the trial is conducted by a master or an appointed local master of the court on a reference.

Varying form

(2) The prescribed form of judgment or report may be varied by the court in order to meet the circumstances of the case so as to afford to any party to the proceedings any right or remedy in the judgment or report to which he is entitled.

When report
deemed
confirmed

(3) The report of a master or an appointed local master shall be deemed to be confirmed at the expiration of the fifteen-day period next following the date that the notice of filing was given, unless notice of appeal is served within that time.

Issue of
execution

(4) The judgment or report may direct any party found liable to make a payment, to make such payment forthwith, and execution may be issued,

- (a) immediately, in the case of a judgment; or

(b) after confirmation, in the case of a report.

(5) The court may order that the interest in the premises be sold and may direct the sale to take place at any time after the judgment or confirmation of the report, allowing a reasonable time for advertising the sale.

Order for
sale

(6) The court may allow any person with a perfected lien,

Persons who
may be let in

(a) who was not served with a notice of trial; or

(b) whose action was stayed by reason of an order under the *Arbitrations Act*,

R.S.O. 1980,
c. 25

to be let in to prove his claim at any time before the amount realized in the action for the satisfaction of the lien has been distributed, and where his claim is allowed, the judgment or report shall be amended to include his claim.

65. Subject to paragraph 3 of subsection 36 (4) (sheltering), the court may award any lien claimant a personal judgment, whether he proves his lien or not, upon any ground relating to his claim that is disclosed by the evidence against any party to the action for any amount that may be due to him and that he might have recovered in a proceeding against that party.

Personal
judgment

66. Where an interest in the premises is sold under court order, or by a trustee appointed under Part IX, a person with a perfected lien is entitled to share in the proceeds of sale in respect of the amount owing to him, although that amount or part thereof was not payable at the time of the commencement of the action or at the time of the distribution of the proceeds.

Right to
share in
proceeds

67.—(1) The court may make all orders necessary for the completion of a sale and for vesting an interest in the premises in the purchaser.

Orders for
completion
of sale

(2) Where an interest in the premises is sold under court order, or by a trustee appointed under Part IX, the proceeds of the sale shall be paid into court to the credit of the action.

Payment into
court of
proceeds

(3) The court may add to the claim of the party having carriage of the action his fees and actual disbursements in connection with the sale.

Fees and
disbursements

To whom
proceeds
paid

(4) The court shall direct to whom the proceeds shall be paid in accordance with the priorities established by this Act.

Where
proceeds
insufficient to
satisfy
judgment

(5) Where the proceeds of the sale are not sufficient to satisfy the judgment and costs, the court shall certify the amount of the deficiency and give personal judgment in the appropriate amount to each person whose judgment is not satisfied out of the proceeds against each person who has been found liable to him.

Application
to court for
directions

68. Where a person has in his possession an amount that may be subject to a trust under Part II, he may apply to the court for direction and the court may give any direction or make any order that the court considers appropriate in the circumstances.

Summary
procedure

69.—(1) The procedure in an action shall be as far as possible of a summary character, having regard to the amount and nature of the liens in question.

Interlocutory
proceedings

(2) Interlocutory proceedings, other than those provided for in this Act, shall not be taken without the consent of the court obtained upon proof that the proceedings are necessary or would expedite the resolution of the issues in dispute.

Application
of rules of
practice
R.S.O. 1980,
c. 223

(3) Except where inconsistent with this Act, and subject to subsection (2), the *Judicature Act* and the Supreme Court Rules of Practice apply to pleadings and proceedings under this Act.

Technical
assistance

(4) The court may obtain the assistance of any merchant, accountant, actuary, building contractor, architect, engineer or other person in such a way as it considers fit, to enable it to determine better any matter of fact in question, and may fix the remuneration of such person and direct the payment thereof by any of the parties.

Representa-
tion by agent

(5) A lien claimant whose claim is for an amount within the monetary jurisdiction of a small claims court may be represented by an agent who is not a barrister and solicitor.

Manner of
making
motion

(6) Where in this Act the court is empowered to do anything upon motion, the motion may be made in the manner provided for in the Supreme Court Rules of Practice for the making of interlocutory motions, regardless of whether any action has been commenced at the time the motion is made.

PART IX

EXTRAORDINARY REMEDIES

70.—(1) Any person having a lien, or any other person having an interest in the premises, may apply to the court for the appointment of a trustee and the court may appoint a trustee upon such terms as to the giving of security or otherwise as the court considers appropriate.

Application
for
appointment
of trustee

(2) Subject to the supervision and direction of the court, a trustee appointed under subsection (1) may,

Powers of
trustee

(a) act as a receiver and manager and, subject to the *Planning Act* and the approval of the court, mortgage, sell or lease the premises or any part thereof;

R.S.O. 1980,
c. 379

(b) complete or partially complete the improvement;

(c) take appropriate steps for the preservation of the premises; and

(d) subject to the approval of the court, take such other steps as are appropriate in the circumstances.

(3) Subject to subsection 80 (7), all liens shall be a charge upon any amount recovered by the trustee after payment of the reasonable business expenses and management costs incurred by the trustee in the exercise of any power under subsection (2).

Liens a
charge on
amounts
recovered

(4) Any interest in the premises that is to be sold may be offered for sale subject to any mortgage, charge, interest or other encumbrance that the court directs.

Sale subject
to
encumbrances

(5) The court may make all orders necessary for the completion of any mortgage, lease or sale by a trustee under this section.

Orders for
completion
of sale, etc.

71.—(1) Where a labour and material payment bond is in effect in respect of an improvement, any person whose payment is guaranteed by that bond has a right of action to recover the amount of his claim, in accordance with the terms and conditions of the bond, against the surety on the bond, where the principal on the bond defaults in making the payment guaranteed by the bond.

Labour and
material
payment
bonds

(2) Nothing in this section makes the surety liable for an amount in excess of the amount that he undertakes to pay under the bond and the surety's liability under the bond shall be

Saving

reduced by and to the extent of any payment made in good faith by the surety either before or after judgment is obtained against the surety.

Subrogation

(3) The surety, upon satisfaction of its obligation to any person whose payment is guaranteed by the bond, shall be subrogated to all the rights of that person.

PART X

APPEALS

Stated case

72.—(1) Where in the course of an action a question of law arises, the court may state the question in the form of a stated case for the opinion of the Divisional Court, and the stated case shall thereupon be set down to be heard before the Divisional Court and notice of hearing shall be served by the party setting down the matter upon all parties concerned.

Facts to be set out

(2) The stated case shall set forth those facts material to the determination of the question raised.

Appeal to Divisional Court

73.—(1) Subject to subsection (3), an appeal lies from a judgment or a report under this Act to the Divisional Court.

Time for filing and serving notice of appeal

(2) A party wishing to appeal a judgment or report shall file and serve his notice of appeal,

- (a) prior to the confirmation of the report where the appeal is in respect of a report; or
- (b) within fifteen days of the date of judgment in all other cases,

but the time for filing or serving the notice of appeal may be extended by the written consent of all parties, or by a single judge of the Divisional Court where an appropriate case is made out for doing so.

Where no appeal lies

(3) No appeal lies from,

- (a) a judgment or a report under this Act, where the amount claimed is \$1,000 or less; or
- (b) an interlocutory order made by the court.

PART XI

PRIORITIES

74. A person who has supplied services or materials in respect of an improvement may enforce his lien despite the non-completion or abandonment of the contract or a subcontract by any other person.

Enforcement
of lien
despite
default

75. The rights of a person having a lien may be assigned by an instrument in writing and, if not assigned, upon his death pass to his personal representative.

Assignment
of lien rights

76.—(1) Subject to section 84, where one or more premises that are subject to an unpreserved general lien are sold, the general lien continues for the full amount of the lien against those premises that are subject to the lien, that were not sold.

Continuation
of general
lien

(2) Where a person having a preserved or perfected general lien releases the lien against one or more of the premises subject to the lien, the lien continues for the full amount of the lien against those premises that were not released.

Idem

77.—(1) The taking of any security for, or the acceptance of any promissory note or bill of exchange for, or the taking of any acknowledgment of, or the giving of time for the payment of, or the taking of proceedings for the recovery of, or the obtaining of a personal judgment for, the claim, does not in itself merge, waive, pay, satisfy, prejudice or destroy a lien.

Effect of
taking
security

(2) Where any promissory note or bill of exchange has been negotiated, the person having the lien may still enforce the lien if he is the holder of the promissory note or bill of exchange at the time when he proves his claim.

Where note
or bill
negotiated

(3) Nothing in this section extends the time for, or dispenses with the requirement for, the preservation or perfection of a lien.

Time not
extended

78. Where a claim for lien is preserved by registration, the lien claimant shall be deemed to be a purchaser to the extent of his lien within the provisions of the *Registry Act* and *Land Titles Act*, but except as otherwise provided in this Act, those Acts do not apply to any lien arising under this Act.

Lien claimant
deemed
purchaser
R.S.O. 1980,
cc. 445, 230

79. The liens arising from an improvement have priority over all judgments, executions, assignments, attachments, garnishments and receiving orders except those executed or re-

Priority of
liens over
executions,
etc.

covered upon before the time when the first lien arose in respect of the improvement.

Priority over
mortgages,
etc.

80.—(1) Except as provided in this section, the liens arising from an improvement have priority over all conveyances, mortgages or other agreements affecting the owner's interest in the premises.

Building
mortgage

(2) Where a mortgagee takes a mortgage with the intention to secure the financing of an improvement, the liens arising from the improvement have priority over that mortgage, and any mortgage taken out to repay that mortgage, to the extent of any deficiency in the holdbacks required to be retained by the owner under Part IV, irrespective of when that mortgage, or the mortgage taken out to repay it, is registered.

Prior
mortgages,
prior
advances

(3) Subject to subsection (2), and without limiting the effect of subsection (4), all conveyances, mortgages or other agreements affecting the owner's interest in the premises that were registered prior to the time when the first lien arose in respect of an improvement have priority over the liens arising from the improvement to the extent of the lesser of,

- (a) the actual value of the premises at the time when the first lien arose; and
- (b) the total of all amounts that prior to that time were,
 - (i) advanced in the case of a mortgage, and
 - (ii) advanced or secured in the case of a conveyance or other agreement.

Prior
mortgages,
subsequent
advances

(4) Subject to subsection (2), a conveyance, mortgage or other agreement affecting the owner's interest in the premises that was registered prior to the time when the first lien arose in respect of an improvement, has priority, in addition to the priority to which it is entitled under subsection (3), over the liens arising from the improvement, to the extent of any advance made in respect of that conveyance, mortgage or other agreement after the time when the first lien arose, unless,

- (a) at the time when the advance was made, there was a preserved or perfected lien against the premises; or
- (b) prior to the time when the advance was made, the person making the advance had received written notice of a lien.

(5) Where any mortgage is registered after the time when the first lien arose in respect of an improvement, the liens arising from the improvement have priority over the mortgage to the extent of any deficiency in the holdbacks required to be retained by the owner under Part IV.

Special
priority
against
subsequent
advances

(6) Subject to subsections (2) and (5), a conveyance, mortgage or other agreement affecting the owner's interest in the premises that is registered after the time when the first lien arose in respect to the improvement, has priority over the liens arising from the improvement to the extent of any advance made in respect of that conveyance, mortgage or other agreement, unless,

General
priority
against
subsequent
mortgages

- (a) at the time when the advance was made, there was a preserved or perfected lien against the premises; or
- (b) prior to the time when the advance was made, the person making the advance had received written notice of a lien.

(7) Despite anything in this Act, where an amount is advanced to a trustee appointed under Part IX as a result of the exercise of any powers conferred upon him under that Part,

Advances to
trustee under
Part IX

- (a) the interest in the premises acquired by the person making the advance takes priority, to the extent of the advance, over every lien existing at the date of the trustee's appointment; and
- (b) the amount received is not subject to any lien existing at the date of the trustee's appointment.

(8) Despite subsections (4) and (6), where a preserved or perfected lien is postponed in favour of the interest of some other person in the premises, that person shall enjoy priority in accordance with the postponement over,

Where
postponement

- (a) the postponed lien; and
- (b) where an advance is made, any unpreserved lien in respect of which no written notice has been received by the person in whose favour the postponement is made at the time of the advance,

but nothing in this subsection affects the priority of the liens under subsections (2) and (5).

Saving

(9) Subsections (2) and (5) do not apply in respect of a mortgage that was registered prior to the day on which this Act comes into force.

Registration
of financial
guarantee
bond

(10) A financial guarantee bond in a form prescribed may be registered on the title to the premises, and where the bond is registered a purchaser who takes title from the mortgagee takes title to the premises free of the priority of the liens created by subsections (2) and (5), the security of the bond takes the place of the priority created by those subsections and persons who have proved liens have a right of action against the surety on the bond.

Persons who
comprise
class

81. All persons having a lien who have supplied services or materials to the same payer comprise a class, and a person who has supplied services or materials to more than one payer is a member of every class to the extent to which his lien relates to that class.

Priority
between and
within class

82.—(1) Except where it is otherwise provided by this Act,

- (a) no person having a lien is entitled to any priority over another member of the same class;
- (b) all amounts available to satisfy the liens in respect of an improvement shall be distributed rateably among the members of each class according to their respective rights; and
- (c) the lien of every member of a class has priority over the lien of the payer of that class.

Where
conveyance
or mortgage
void

(2) Any conveyance or mortgage in respect of the premises to any person entitled to a lien on the premises, in payment of or as security for that claim, whether given before or after that lien arises, is void against all other persons entitled to a lien on the premises.

Worker's
priority

83.—(1) The lien of a worker has priority over the lien of any other person belonging to the same class to the extent of the amount of forty regular-time working days' wages.

Workers'
trust fund

(2) Where monetary supplementary benefits are payable to a workers' trust fund instead of to a worker, the trustee of the workers' trust fund is subrogated to the rights of the worker under this Act with respect to those benefits.

(3) Every device to defeat the priority given to workers by this section is void.

Device to defeat workers' priority void

84. Where a general lien is realized against a premises in an action in which other liens are also realized against the premises,

Subordination of general lien claims

- (a) the general lien shall rank with the other liens according to the rules of priority set out in section 82 only to the extent of,

- (i) the total value of the general lien,

divided by,

- (ii) the total number of premises to which the person having the general lien supplied services or materials under his contract or subcontract; and

- (b) in respect of the balance of the general lien, it shall rank next in priority to all other liens against the premises, whether or not of the same class.

85. Where a premises that is subject to a lien is destroyed in whole or in part, any amount received by the owner or a mortgagee by reason of any insurance on the premises shall take the place of the premises so destroyed and shall be distributed in accordance with the priorities set out in this Part.

Application of insurance proceeds

86. Where an interest in the premises is sold or leased under an order of the court or by a trustee appointed under Part IX, the proceeds received as a result of that disposition, together with any amount paid into court under subsection 67 (2), shall be distributed in accordance with the priorities set out in this Part.

Distribution of proceeds of sale

87.—(1) Where a payer becomes insolvent, the trust fund of which that payer is trustee shall be distributed so that priority over all others is given to a beneficiary of that trust who has proved a lien and a beneficiary of a trust created by section 8 that is derived from that trust, who has proved a lien.

Priorities on insolvency

(2) Priority in the distribution of trust funds among those who have proved liens shall be in accordance with the respective priorities of their liens as set out in this Part.

Idem

(3) The remaining trust funds shall be distributed among the beneficiaries of that trust and the beneficiaries of trusts created by section 8 that are derived from that trust, whose liens have

Idem

not been proved, in accordance with the respective priorities to which those liens would have been entitled as set out in this Part, had those liens been proved.

PART XII

MISCELLANEOUS RULES

Costs

88.—(1) Subject to subsection (2), any order as to the costs in an action, application, motion or settlement meeting is in the discretion of the court, and an order as to costs may be made against,

- (a) any party to the action or motion; or
- (b) the solicitor or agent of any party to the action, application or motion, where the solicitor or agent has,
 - (i) knowingly participated in the preservation or perfection of a lien, or represented a party at the trial of an action, where it is clear that the claim for lien is without foundation or is for a grossly excessive amount, or that the lien has expired, or
 - (ii) by his conduct prejudiced or delayed the conduct of the action,

and the order may be made on a solicitor-and-client basis, including where the motion is heard by, or the action has been referred under section 60 to, a master or an appointed local master.

Where least expensive course not taken

(2) Where the least expensive course is not taken by a party, the costs allowed to him shall not exceed what would have been incurred had the least expensive course been taken.

Scale of costs

(3) Except where otherwise ordered by the court hearing an appeal, the costs of an appeal shall be on the scale of costs allowed in county court appeals where the amount involved is within the proper competence of the county court and where it exceeds that amount shall be on the Supreme Court scale.

How documents may be given

89.—(1) Subject to subsection (3) and, except where otherwise ordered by the court, all documents and notices required to be given or that may be given under this Act, may be served in any manner permitted under the Rules of the Supreme Court or, in the alternative, may be sent by certified or registered mail addressed to the intended recipient at his last known mailing address,

- (a) according to the records of the person sending the document; or
- (b) as stated on the most recently registered instrument identifying him as a person having an interest in the premises.

(2) In the absence of evidence to the contrary, a document or notice sent to a person by certified or registered mail shall be deemed to have been received by him on the fifth day following the date on which it was mailed, exclusive of Saturdays and holidays.

When document deemed received

(3) Except where otherwise ordered by the court, the following shall not be sent by certified or registered mail but shall be served in the manner provided in the Rules of the Supreme Court for service of a writ of summons:

Service of particular documents, etc.

1. Statement of claim.
2. Notice of trial or settlement meeting.
3. Notice of appeal.

(4) Where a document or notice is sent by registered mail, the date appearing on the postal registration receipt shall be deemed conclusively to be the date of mailing.

Date of mailing

90. The Lieutenant Governor in Council may make regulations,

Regulations

- (a) prescribing forms and providing for their use;
- (b) prescribing the appropriate offices of the Crown to which claims for lien must be sent;
- (c) prescribing the form and manner of publication of copies of certificates and declarations of substantial performance under section 32.

91. Sections 1 to 51 and section 53 of the *Mechanics' Lien Act*, being chapter 261 of the Revised Statutes of Ontario, 1980, are repealed.

Repeal

92.—(1) This Act comes into force on the 2nd day of April, 1983, and applies to all contracts entered into on or after that date and to the subcontracts arising under those contracts and to all services or materials supplied thereunder.

Commencement and application

Transitional
R.S.O. 1980,
c. 261

(2) Despite section 91, the *Mechanics' Lien Act* continues to apply to all contracts entered into before the 2nd day of April, 1983, and to the subcontracts arising under those contracts and to all services or materials supplied thereunder.

Idem

(3) Despite section 91, where a contract entered into before the 2nd day of April, 1983 is amended in good faith on or after that date, the *Mechanics' Lien Act* applies to that amendment and to all subcontracts arising under it and to all services or materials supplied thereunder.

Short title

93. The short title of this Act is the *Construction Lien Act, 1983*.